TAN TECK HING & ANOR

v.

LEE YONG KONG & ANOR

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 12-1 OF 2002]
10 JANUARY 2003

TORT: *Damages - Quantum of damages - Severe head injury arising from accident - Appeal against sum of judgment award - Whether judgment made erroneous*

DAMAGES: *Personal injuries - Special damages - Loss of future earnings - Whether award given sustained - Loss of libido, smell and reduced taste sensation - Whether substantiated by medical reports - Whether there was error occasioned by trial judge - Lump sum award: overlapping - Whether element of overlapping arose*

This was an appeal by the appellants ("defendants") against the entire decision of the Sessions Court judge ("trial judge") who had found the defendants 100% liable in a motor vehicle accident. The defendants claimed that: (1) there was excessive and unsubstantiated award for loss of future earnings as the second plaintiff had been working even after the accident; (2) the trial judge had erred when it awarded the second plaintiff RM40,000 for loss of libido and RM20,000 for loss of smell and reduced taste sensation and (3) that the three injuries mentioned had emanated from the same source ie, the head injury and that the trial judge did not take into account the element of overlapping.

Held:

[1] The trial judge had made absolutely no evaluation on or reference to the second plaintiff's own crucial evidence pertaining to his ability to work for one Ah Seng and that he was earning RM80 daily for 21 to 22 days per month after the accident. The trial judge's finding was against the weight of evidence. The second plaintiff had removed all the probabilities in respect of his loss of future earnings and has succeeded in proving that he had been gainfully employed after the accident. Hence this award by the trial judge could not be sustained. (p 404 a-g)

[2] A medical report showed that the second plaintiff suffered from loss of libido since the accident. Also, the defendants failed to cross-examine the

second plaintiff or his wife on this fundamental fact thus the defendants should not raise it as an issue in this appeal. Hence, the award of RM40,000 was fair, reasonable and not a wholly erroneous estimate. (pp 405 a-d & 406 e)

[3] It was further substantiated that the second plaintiff suffered from disability of loss of smell and reduced taste sensation. Further, the defendants did not cross-examine the second plaintiff in respect of this disability which was tantamount to an abandonment of the pleaded case and so the defendants may properly be barred from raising it in argument. No error was occasioned by the trial judge in this award. (p 407 a-c)

[4] The individual quantum awarded above was fair and reasonable, for separate and distinct parts of the second plaintiff's anatomy in which case the element of overlapping does not arise here. (p 408 a-b)

[Appeal against award for loss of future earnings allowed; appeal against other aforesaid awards dismissed and hereby confirmed.]

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Appeal [1995] 3 CLJ 639 CA ***(refd)***

Ariffin Omar v. Goh Beng Kee & Anor (No 1603 of 1988, High Court Singapore) HC ***(refd)***

Browne v. Dunn [1893] 6 R67 HL ***(refd)***

Abu Hassan Ali v. Lee Peng Kong [1977] 2 MLJ 121 HC ***(refd)***

Chong Chee Khong & Anor v. Ng Yeow Hin [1997] 4 CLJ Supp 17 HC ***(refd)***

Chua Kim Liang & Anor v. Teo Kim Ngo [1963] MLJ 262 FC ***(refd)***

Hang Jong Juan v. Tan Yeo Soon [1985] 1 CLJ 394 CA ***(refd)***

Jamil Harun v. Yang Kamsiah [1984] 1 MLJ 217 PC ***(refd)***

Joremi Kimin & Anor v. Tan Sai Hong [2001] 1 CLJ 526 CA ***(refd)***

Loh Soon Thiam v. Othman Wahab [1979] 1 MLJ 43 HC ***(refd)***

Malayan Railway Administration v. Wong Ah Lek & Ors [1970] 1 MLJ 215 HC ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Yee Yat Wah v. Hoo Wong & Anor; Shim Chin Tong (Third Party) [1994] 3 CLJ 414 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 101

Other source(s) referred to:

Traumatic Medicine and Surgery for the Attorney, 1961, vol 5, p 519

For the defendants - TS Wee; M/s David Lingam & Co
For the 2nd plaintiff - CS Ng; M/s Murphy & Dunbar

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal by the appellants (the defendants in the sessions court) in which the notice of appeal was drafted as an appeal against the entire decision of the learned trial judge who had on 3 January 2002 found the defendants 100% liable in a motor vehicle accident, thereby awarding damages as follows:

1. To the first respondent (first plaintiff in the sessions court), general damages of RM13,000, special damages of RM4,155, with interest;
2. the second respondent (second plaintiff in the sessions court), general damages of RM130,000, special damages of RM167,154.69, together with interest; and
3. costs RM15,692.40.

However, the defendants have on 4 July 2002 withdrawn their appeal against liability and also the quantum of damages awarded by the trial court in favour of the first plaintiff.

The appeal before me is accordingly confined to the quantum of damages awarded to the second plaintiff in respect of:

1. loss of future earnings;
2. loss of libido;
3. loss of smell and reduced taste sensation; and
4. overlapping in the context of personal injury claim.

Loss Of Future Earnings

For the second plaintiffs claim for loss of future earnings, the learned trial judge awarded a sum of RM600 for 14 1/2 years, amounting to RM104,400, on the ground that the second plaintiff aged 30 at the time of the accident has adduced evidence by way of a medical report prepared by consultant neurosurgeon Dr. Chee Chin Pin to the effect that the second plaintiff had not been working since the accident until two months before the date of the medical report dated 9 December 2000 ie, October 2000 when he attempted to go back to work but "was stopped by his boss a month later because of slowness in his work". As a result, the second plaintiff was "helping in household chores, like sweeping the floor and cooking. Otherwise he would watch television or eat titbits".

The second plaintiff is a sub-contractor of SP5 one Siew Kam Vin of Mavin Engineering and Trading Sdn Bhd ("Mavin") dealing in air-conditioning works. SP5 confirmed the second plaintiff's slowness in his work.

There was evidence adduced from the defendant's own witness SD2 one Jayabal David, an adjuster who testified to the effect that for two days during which he kept surveillance on the second plaintiff, he found that the second plaintiff was not working.

On the aforesaid award by the learned trial judge, it was submitted by learned counsel En TS Wee, for the defendants, that there was excessive and unsubstantiated award for loss of future earnings, as the second plaintiff has testified that he has been working since August 2000 and that from December 2000 he was working for one Ah Seng only, who has no connection with Mavin, for an average of 21 to 22 days monthly, earning RM80 daily. This was confirmed by the second plaintiff under cross-examination by learned counsel for the defendants, as a result of which he submitted that there should be no award for loss of future earnings.

For the second plaintiff, it was contended by learned counsel En CS Ng that in making an award for loss of future earnings, the totality of evidence must be taken into account, as the second plaintiff had suffered a severe head injury and therefore care should be taken in evaluating his evidence. He added that medical evidence confirmed that the second plaintiff did not have insight of his behaviour problem, had no interest in work ambition or motivation and thus unable to continue with his work. It was further argued that the second plaintiff's employer had confirmed that after the accident the second plaintiff was unable to perform his work satisfactorily and as such his earnings were less. He relied on the adjuster's evidence that the second plaintiff was not working for two days.

In my judgment, the burden of proof is on the second plaintiff to establish that the accident had resulted in his loss of future earnings which he has asked the court to make an award in his favour. This is clearly borne out in s. 101 of the Evidence Act 1950 which reads as follows:

> Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of the facts which he asserts, must prove that those facts exist.

After considering the totality of evidence adduced by and for the second plaintiff, the question is whether he has discharged this burden of proof. The finding of the learned trial judge was essentially and indeed exclusively based on the medical report, SP5 Siew Kam Vin of Mavin Engineering and the

adjuster's evidence that the second plaintiff was away from work for two days. Had there been no other evidence to the contrary or indeed contradicting the aforesaid evidence, the learned trial judge would have been correct in his award. Unfortunately, the learned trial judge has made absolutely no evaluation on or reference whatsoever to the second plaintiff's own crucial evidence pertaining to his ability to work for one Ah Seng who the second plaintiff confirmed has nothing to do with Mavin and that he was earning RM80 daily for 21 to 22 days per month after the accident. Had the learned trial judge evaluated or referred to the second plaintiff's said evidence, his finding and the award made thereon may well have been different. The learned trial judge did not say whether he believed or disbelieved the second plaintiff's entire evidence, nor rejected it and the reason for the rejection if that be the case. It is to be observed that the second plaintiff's evidence remains unshaken in the re-examination by his learned counsel. The second plaintiff's evidence has rebutted the evidence in the medical report and the evidence that he was working in Mavin.

The entire evidence of the adjuster established that the second plaintiff was not working for the two days under surveillance and that was completely consistent with the second plaintiff's own evidence that he was merely working for 21 to 22 days per month. In the circumstances, it is apparent to me that the learned trial judge's finding is against the weight of evidence. The balance of probabilities would have been in favour of the second plaintiff if there had been no contradictory evidence by the second plaintiff who has indeed removed all the probabilities in respect of his loss of future earnings. He has as a matter of fact succeeded in proving that he has been gainfully employed after the accident. Hence this award by the learned trial judge cannot be sustained: *Malayan Railway Administration v. Wong Ah Lek & Ors* [1970] 1 MLJ 215 HC.

The alternative submission for the second plaintiff that the second plaintiff would sometime in the future be subject to the risk that he might lose his employment and be disadvantaged in getting alternative employment because of his injuries seems to me to run counter to the second plaintiffs own evidence as alluded to above. I am therefore unable to uphold this submission.

Loss Of Libido

It was submitted for the defendant that the learned trial judge has made an award of RM40,000 in favour of the second plaintiff for loss of libido, in the absence of any medical test to establish this.

The stand taken for the second plaintiff is that the specialists had come to a conclusion that the second plaintiff has suffered loss of libido.

In my judgment, a proper perusal of the appeal record reveals that Dr M Nachiappan, a neurosurgeon has stated in his medical report that the second plaintiff's wife has complained that he has lost his libido since the accident, while Dr Chee Chin Pin, another neurosurgeon, opined in his medical report that the second plaintiff has decreased libido, having sex once or twice a month. It is to be observed that these two medical reports have been agreed to by the parties herein and so have been accepted by the learned trial judge. In this respect, I am of the view that there has been no error of fact or law on the part of the learned trial judge.

It is also vital to state that at the hearing in the court below the defendants' learned counsel has not cross-examined the witnesses such as the second plaintiff or his wife on this fundamental fact.

Hence, I am unable to see how the defendants' learned counsel can now raise it as an issue in this appeal.

In *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Appeal* [1995] 3 CLJ 639, the Court of Appeal when applying the rule in *Browne v. Dunn* [1893] 6 R67 HL said:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

(See also *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545, 551 CA; *Joremi Kimin & Anor v. Tan Sai Hong* [2001] 1 CLJ 526, 533 CA).

Respective learned counsel appeared to be at variance as to the exact meaning of "loss of libido" ie, whether it is impotency or lack of sexual desire. In my view, libido means sexual desire (see *Oxford Advanced Learner's Dictionary*, 6th edn). Loss of libido is a loss of sexual desire which may be distinguished from complete impotency which implies the inability to gain an erection or the lack of sexual desire (See *Traumatic Medicine and Surgery for the Attorney*, vol. 5, 1961, p. 519 "definition"). In any event, I am of the view that the difference is not a matter of kind but merely a matter of degree in that impotency involves a more serious degree of sexual impairment while loss of libido brings about a situation of relatively minor concern.

I shall now proceed to make a survey, which I must add is not exhaustive, on the quantum for this kind of cases.

In *Ariffin bin Omar v. Goh Beng Kee & Anor*, No. 1603 of 1988 the assistant registrar of the Singapore High Court awarded a sum of S$55,000 for the rupture of urethra and impotency arising out of an accident on 14 March 1987.

In *Yee Yat Wah v. Hoo Wong & Anor; Shim Chin Tong (Third Party)* High Court KL P25-471-86 Wan Mohamed J (as he then was) awarded RM60,000 for impotency.

Further, in *Abu Hassan bin Ali v. Lee Peng Kong* [1977] 2 MLJ 121, on a finding of loss of sexual function, in addition to multiple abrasions and lacerations, Abdul Hamid J (later LP) awarded a sum of RM27,500, while Ismail Khan, J's (later CJ (Borneo)) award of RM25,000 for pain and suffering including loss of sexual function was upheld by the Federal Court in *Chua Kim Liang & Anor v Teo Kim Ngo* [1963] MLJ 262.

In *Loh Soon Thiam v. Othman bin Wahab* [1979] 1 MLJ 43, an award of RM32,000 was handed down by Gunn Chit Tuan, J (later CJ(M)) for impairment of sexual performance including injuries to radius, ulna and femur.

In *Hang Jong Juan v. Tan Yeo Soon* [1985] 1 CLJ 394, the Singapore Court of Appeal held that in an appeal against the quantum of damages it is settled law that the onus on the appellant is an onerous one and it must be established plainly that the trial judge's award was a wholly erroneous estimate. I agree and adopt this principle here and hold that the award of RM40,000 for loss of libido is fair and reasonable and not a wholly erroneous estimate.

Loss Of Smell And Reduced Taste Sensation

The learned trial judge awarded a sum of RM20,000 for this item which in this appeal the defendant submitted was unsubstantiated and unjustified in that no tests were carried out by the doctors preparing their medical reports and that there were discrepancies. It was further contended that the second plaintiff was found by the adjuster to be cooking at home, which a person cannot do if he had suffered loss of smell and reduced taste sensation.

For the second plaintiff, it was stressed that the learned trial judge had not erred in making this award as the medical reports contained clear and precise findings on this item.

The issue before me is whether there is any evidence to support the trial judge's award. As in the award for loss of libido, the award for this disability is based on medical reports which have been agreed upon by the parties herein. Further,

in respect of this disability, learned counsel for the defendants had chosen not to cross-examine the second plaintiff, in which case it seems clear to me that this is tantamount to an abandonment of the pleaded case and so the defendants may be properly barred from raising it in argument: See *Aik Ming (M) Sdn Bhd*, *supra*, *Sivalingam Periasamy*, *supra*, and *Joremi Kimin*, *supra*.

In any event, the medical reports prepared for the second plaintiff did specifically refer to this disability eg, reports by Dr Loh Thim, Dr Chee Wee Liam and Dr M Nachiappan. There is in my view no error occasioned by the learned trial judge in this award.

Overlapping Of Damages

It was submitted that there was overlapping in the award by the trial judge in respect of the following injuries:

1. Head injury RM70,000
2. Loss of libido RM40,000
3. Loss of smell and taste RM20,000

The defendants argued that these injuries emanated from the same source ie, the head but that the learned trial judge did not take into account the element of overlapping.

The point taken for the second plaintiff is that the second plaintiff has suffered injuries to different parts of the anatomy and so it was justifiable to break up the award to various categories before the process of overlapping could be applied.

In my judgment, it is to be observed that there are merits in the submission for the second plaintiff and that the award of the learned trial judge for the aforesaid injuries by way of itemisation is not strictly prohibited as has been so clearly enunciated by the Privy Council in *Jamil bin Harun v. Yang Kamsiah* [1984] 1 MLJ 217 that "though no statutory requirement exists in Malaysia for the itemisation of damages in personal injury cases, the written law certainly does not forbid or prevent differentiation in the period or rate of interest as appropriate between the different heads of loss or damages suffered by a plaintiff. Nor does the written law forbid the courts to adopt the itemisation process in assessing damages. The courts in Malaysia are free to take their own course and the Federal Court was therefore not prevented by the written laws of Malaysia from using the itemisation process in the assessment of damages for personal injury."

The assessment of damages is essentially an exercise of discretion as has been shown in *Chong Chee Khong & Anor v. Ng Yeow Hin* [1997] 4 CLJ Supp 17 HC. The individual quantum awarded above was fair and reasonable, for separate and distinct parts of the second plaintiff's anatomy in which case the element of overlapping does not arise here.

Conclusion

In the light of the above, I hold that the appeal against the award for loss of future earnings is allowed, and the award thereon is hereby set aside while the appeal against other aforesaid awards is dismissed and those awards are hereby confirmed. The fair and reasonable order as to costs is that each party shall bear its own costs in the appeal herein, while the order as to costs in the trial court is hereby affirmed.